

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>PEGGY OFFILL</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 126,370 & 126,620
<b>UNIVERSITY OF KANSAS</b>	)	
Respondent	)	
AND	)	
	)	
<b>STATE SELF INSURANCE FUND</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

The respondent, University of Kansas, and its insurance carrier, State Self Insurance Fund, appealed the April 22, 1999 Award entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on September 21, 1999.

**APPEARANCES**

Chris Miller of Lawrence, Kansas, appeared for claimant. Jeff K. Cooper of Topeka, Kansas, appeared for the respondent and its insurance carrier. James C. Wright of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Appeals Board considered the record and adopts the stipulations listed in the Award.

**ISSUES**

This is a proceeding for review and modification. In the previous award, entered July 16, 1992, Judge Palmer awarded claimant compensation based upon a work disability. On April 22, 1999, Judge Avery modified that 100 percent permanent partial disability award to a permanent total disability effective October 7, 1997. The sole issue

for determination by the Appeals Board concerns the nature and extent of claimant's disability; specifically, whether claimant is now permanently and totally disabled.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds that the Award entered by the Administrative Law Judge should be affirmed. The findings, conclusions and orders of the Administrative Law Judge are hereby adopted by the Appeals Board as its own.

Permanent total disability exists when an employee, on account of his or her work related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment. K.S.A. 44-510c(a)(2) (Ensley).

An injured worker is permanently and totally disabled when she is "essentially and realistically unemployable." Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993). The injuries claimant suffered do not raise a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2); therefore it is the responsibility of the trier of fact to determine the existence, extent and duration of an injured worker's incapacity. Wardlow, at 112.

The "existence, extent and duration of an injured workman's incapacity is a question of fact for the trial court to determine." Boyd v. Yellow Freight Systems, Inc., 214 Kan. 797, 803, 522 P.2d 395 (1974). It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Respondent argues that claimant is not entitled to review and modification of the prior award because any change in claimant's condition is the result of her age and not the work related injuries. It is significant that claimant, born January 24, 1925, was 74 years old at the time of Judge Avery's decision. Claimant's age is obviously a factor in her ability to access the open labor market, as pointed out by respondent's vocational expert, Mr. Monty Longacre.

Where the permanency of a claimant's condition does not result from a work related injury, a claimant's employer is not liable for permanent disability benefits. West-Mills v. Dillon Companies, Inc., 18 Kan. App. 2d 561, Syl. ¶ 4, 859 P.2d 382 (1993). Further, when the injury is attributable solely to a personal condition of the employee, there can be no causal connection to the worker's employment, and the injury is not compensable. See, Baggett v. B & G Construction, 21 Kan. App. 2d 347, Syl. ¶ 2, 900 P.2d 857 (1995).

In Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997), the Kansas Supreme Court held that the natural and probable consequence of a work related injury, including the effects of the normal aging process on those injuries, are compensable. "Where the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury." Nance, at 550.

Claimant testified that she considered her right shoulder to be worse now because, in addition to the weakness and decreased motion she had before, she now has additional pain. She also has degenerative arthritic changes in both wrists and hands with decreased grip strength bilaterally. Claimant testified that she was not physically able to work. She has not worked since her second work related accident. Although she occasionally sought employment she never received any job offers.

Vocational expert Michael J. Dreiling, who interviewed claimant at her attorney's request, opined that claimant was incapable of performing any type of substantial, gainful employment from a vocational standpoint. Mr. Dreiling did take into account claimant's age as a part of her overall vocational profile, but claimant's age, in and of itself, would not keep her from working. In addition to her medical restrictions, he noted claimant's limited education and lack of formal vocational training as impediments to her becoming employed. Based upon her limited education and training he did not find any significant occupational skills that claimant had acquired through her work that would readily transfer to other occupations.

Conversely, Mr. Longacre did not find claimant to be unemployable. Although he agreed claimant's age would be a significant impediment to employment, he identified several sedentary jobs which he considered to be within Dr. Delgado's restrictions. His list included being a companion sitter, a surveillance worker where she would simply observe video screens and report incidents to people on the floor via telephone, a greeter, an informational clerk, a parking lot attendant, and a proofreader. He was not at all confident, however, that claimant could be successfully placed in one of those jobs.

In this case the Administrative Law Judge appointed Dr. Peter V. Bieri to perform an independent medical examination of claimant. Dr. Bieri opined that "residuals of the work-related injuries contributes [sic] substantially to the total inability of this claimant to return to substantial and gainful employment." He also pointed out that additional factors that are not directly attributable to the work related injuries likewise contribute to claimant's disability. Nevertheless, he considered the work injuries to be the predominate factor.

Although respondent's medical expert, Dr. Sergio Delgado, testified he did not consider claimant to be permanently and totally disabled from her work injuries, he also said in his July 31, 1998 report, that claimant "would not be able to return to any marketable work activities in the future." He testified that he would assign 50 percent of claimant's inability to work to her injuries and the other 50 percent to aging and her bilateral

involuntary tremors. Claimant argues Dr. Delgado equivocates in his opinions, but in his deposition testimony, Dr. Delgado clarified that his opinion that claimant could not work was based upon her total medical condition and not just the work related injuries.

Placing greater weight on the opinions given by Dr. Bieri and Mr. Dreiling, Judge Avery found claimant to be permanently and totally disabled due to the progression of her work related injuries and resulting overall medical condition. The Board agrees with the Administrative Law Judge's analysis and conclusions.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery dated April 22, 1999, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2000.

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BOARD MEMBER

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Chris Miller, Lawrence, KS  
Jeff K. Cooper, Topeka, KS  
James C. Wright, Topeka, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director